

10/403,898

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant: Giannini *et al.* Examiner: Kyle, Charles
Serial No.: 09/531,102 Group Art Unit: 3624
Filed: March 17, 2000 Docket No.: JARB.004PA
Title: Merged Images Viewed Via a Color-Code Scheme

CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence and the papers, as described hereinabove, are being deposited in the United States Postal Service, as first class mail, in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on November 8, 2006.

By: Kelly S. Waltigney

Kelly S. Waltigney

APPEAL BRIEF

Mail Stop Appeal Brief-Patents
Commissioner For Patents
P.O. Box 1450
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Customer No.

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Dear Sir:

This Appeal Brief is submitted pursuant to 37 C.F.R. §41.37, in support of the Notice of Appeal filed on September 14, 2006 and in response to the final rejections of Claims 17-31 as set forth in the final Office Action dated June 23, 2006.

Please charge **Deposit Account number 50-0996 (JARB.004PA) \$250.00** for filing this brief in support of an appeal as set forth in 37 C.F.R. §1.17(c). If necessary, authority is given to charge/credit Deposit Account 50-0996 (JARB.004PA) additional fees/overages in support of this filing.

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I. Real Party In Interest

The real party in interest is the Assignee, Jarbridge, Inc.

II. Related Appeals and Interferences

Appellant is unaware of any related appeals or interferences.

III. Status of Claims

Claims 1-16 stand canceled; claims 17-31 stand rejected and are presented for appeal; the pending claims under appeal are listed in the attached Claims Appendix.

IV. Status of Amendments

No amendments have been filed subsequent to the Final Office Action dated June 23, 2006.

V. Summary of Claimed Subject Matter

Commensurate with independent claim 17, the present invention is directed to a system and method for on-line viewing of multiple apparel articles (*e.g.*, blouse and slacks) that bear true colors which cannot be accurately discerned via on-line (*e.g.*, computer monitor) viewing. One aspect of the present invention is generally directed to viewing at least two articles on-line and matching the articles by color using a color-identification standard. An example implementation of this aspect of the present invention involves on-line viewing of a first and second article through linking nodes. A coded color matching approach uses respective color codes that are provided with the articles to the computer device to permit the computer device to determine whether the respective color codes (associated with the articles) satisfy a matching criterion. An advantage of such an implementation is that a user is able to have the computer device differentiate among varying shades of a similar color (*e.g.*, multiple shades of blue) that would otherwise appear the same on a computer display; for example, the computer device determines automatically and accurately whether a particular shade of blue matches or clashes with another item of an apparently similar shade of blue.

One embodiment of the present invention is directed to a system for comparison of multiple apparel articles. *See, e.g.*, page 5, lines 17-25 and in Figure 1, the sellers 114. The system includes an on-line viewer site 112 and a computer-driven web-linking engine 101. The computer-driven web-linking engine is configured and arranged to display a first colored apparel article selected by an on-line viewer from the on-line viewer site for display with a second colored apparel article that is also selected by an on-line viewer from the on-line viewer site 102 and/or 103. The computer-driven web-linking engine is adapted to use a color matching criterion to determine whether the first colored apparel article color matches the second colored apparel article color. *See, e.g.*, page 6, lines 8-15.

As required by 37 C.F.R. § 41.37(c)(1)(v), a concise explanation of the subject matter defined in the independent claims involved in the appeal is provided herein. Appellant notes that representative subject matter is identified for these claims; however, the abundance of supporting subject matter in the application prohibits identifying all textual and diagrammatic references to each claimed recitation. Appellant thus submits that other application subject matter, which supports the claims but is not specifically identified above, may be found elsewhere in the application. Appellant further notes that this summary does not provide an exhaustive or exclusive view of the present subject matter, and Appellant refers to the appended claims and their legal equivalents for a complete statement of the invention

VI. Grounds of Rejection to be Reviewed Upon Appeal

1. Claims 25-26 stand rejected under 35 U.S.C. § 112(2) as being indefinite.
2. Claims 17, 19-22 and 30-31 stand rejected under 35 U.S.C. § 103(a) over Arnold *et al.* (U.S. Patent No. 6,016,504) in view of Dial (U.S. Patent No. 5,537,211).
3. Claim 18 stands rejected under 35 U.S.C. § 103(a) in view of Arnold *et al.* (U.S. Patent No. 6,016,504) and Dial (U.S. Patent No. 5,537,211), and in further view of Rose (U.S. Patent No. 5,930,769).
4. Claims 23-29 stand rejected under 35 U.S.C. § 103(a) in view of Arnold (U.S. Patent No. 6,016,504) and Dial (U.S. Patent No. 5,537,211), and in further view of Shimizu *et al.* (U.S. Patent No. 6,323,969)

VII. Argument

A. The Section 103(a) rejection of claims 17-31 is improper because the Examiner fails to present prior art that teaches the claimed invention as a whole: the asserted references teach away from the asserted combination; and there is no evidence in the record of the requisite motivation.

The Arnold reference fails to teach color matching a first colored apparel article to a second colored apparel article. The Examiner attempts to address this deficiency using the teachings of the Dial reference; however, the references teach away from the Examiner's asserted combination.

The primary Arnold reference is directed to a web-based "virtual outlet" for shopping on the internet allowing for remote purchasing of good by a customer, and as such, teaches away from having physical access to any of the apparel items. *See, e.g.*, Abstract, Fig. 1A, and col. 5, line 41 to col. 6, line 34. Whereas, the color matching taught by Dial (and as cited by the Examiner) requires physical access to the items in order to provide a color measurement using a photosensor head. *See, e.g.*, col. 6, lines 24-34. More specifically, a light source illuminates the item for comparison and a photosensor provides an indication of the color of the object. *See, e.g.*, Col. 4, lines 45-54. A specific object of the Dial reference is to provide

a point of sale device for accomplishing such a color determination. *See, e.g.*, col. 1, lines 56-59 and col. 3, lines 25-44. Moreover, the asserted combination would not function properly because the Arnold reference is directed to Web pages that customers can link through to a merchant's page. *See, e.g.*, Abstract. Thus, the invention of the Arnold reference teaches a web interface that is a level removed from even the merchant's page and as such would not provide direct access to the goods being sold as required by the teachings of the Dial reference. Accordingly, a stated object of the Dial reference and the supporting teachings of the Dial reference each teach away from the Examiner's asserted combination of references.

Moreover, in response to the statement that "the Examiner did not suggest the bodily incorporation of the physical device of Dial in the web shopping of Arnold, but rather simple color matching," one skilled in the art when viewing Arnold would not be lead by Dial to add virtual color matching to Arnold because in every embodiment Dial teaches that one must have physical access to the articles to perform color matching. The Examiner has failed to address how this proposed combination would operate without the physical access to the article.

The Examiner has not supplied any evidence of motivation that one skilled in the art would be led by Dial to add virtual color matching to Arnold. Instead, the Examiner relies upon hindsight reconstruction of the claimed invention without evidence of motivation, which is not sufficient to establish obviousness. *See, e.g., W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984).

The proposed modification is improper because it would frustrate the purpose of Arnold. As is consistent with relevant case law and the M.P.E.P., there is no motivation to modify a reference where the modification would undermine or defeat the purpose of the reference. *See, e.g., In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). The Arnold reference is directed to a web-based "virtual outlet" and as such does not have physical access to any of the apparel items. The color matching taught by Dial requires physical access to the items in order to measure them with a photosensor means. *See, e.g.*, col. 6, lines 24-34. There would be no motivation to combine the color matching of Dial

with the “virtual outlet” taught by Arnold, because the combination would defeat the purpose of Dial in that it would no longer be a virtual outlet. See M.P.E.P. § 2143.01

Moreover, the Examiner’s assertion of motivation relies upon a portion of the Dial reference (Col. 6, lines 49-61) that does not teach a motivation for implementing color matching using a web-linking engine. More specifically, the cited portion of the Dial reference merely teaches that color matching can be accomplished by matching articles that having the smallest difference between colors. *See, e.g.*, col. 6, lines 49-61. The Examiner fails to show how any portion of either reference that suggests implementing color matching using a web-linking engine. Moreover, for the reasons discussed above, the color matching taught by the Dial reference is only possible when one has physical access to the colored articles that one wishes to compare. Accordingly, the Examiner has provided no motivation of how or why one skilled in the art would be led by Dial to add virtual color matching to Arnold.

For the reasons discussed herein, the Section 103(a) rejection of claims 17-30 is improper and should be withdrawn.

B. The Section 112, second paragraph, rejection of claims 25 and 26 is improper because the claims are discernable to one skill in the art.

Section 112, second paragraph, rejection is improper because the claimed limitations are readily discernable in a manner consistent with the requirements of Section 112(2), and are further supported in the specification. Specifically, as consistent with M.P.E.P. § 2173.02, “[t]he requirement to ‘distinctly’ claim means that the claim must have a meaning discernible to one of ordinary skill in the art when construed according to correct principles.” Further, a claim is indefinite “[o]nly when a claim remains insolubly ambiguous without a discernible meaning after all reasonable attempts at construction.” The Section 112(2) rejection of claims 25 and 26 are improper because the indicated claim term “compatible” would be understood by one of ordinary skill in the art, and is supported by examples in the specification. For instance, the specification describes various example embodiments including that an industry-standardization scheme can be used to determine color compatibility, examples include Exxel Color Match Guide. *See, e.g.*, page 5, lines 23-28; *see also* M.P.E.P. § 2173.05. Accordingly, the term compatible denotes the use of objective standards to determine color compatibility and

is not based on individual personal taste as alleged by the Examiner. Instead, determining color compatibility, as taught by Applicant's Specification, is implemented using objective standards, and thus, has a meaning discernable to one of ordinary skill in the art. In view of the above argument, the Section 112(2) rejections of claims 24-25 are improper and should be withdrawn.

C. The Section 103 rejection of claims 23-29 is improper because the Examiner fails to present prior art that teaches the claimed invention as a whole: there is no evidence in the record of the requisite motivation; and the Examiner does not show correspondence to the claimed limitations.

The Examiner relies upon the Shimizu reference to teach the limitations directed to the use of color codes to match apparel items. The Shimizu reference teaches an apparatus and method that allows dissimilar devices (*e.g.*, scanners, printers, displays and facsimiles) to exchange color images and accurately reproduce colors from the sending device to the receiving device despite different color capabilities of the two devices. *See, e.g.*, Abstract and col. 5, lines 46-52. The Examiner fails to provide any evidence of motivation to combine the cited references. Moreover, Examiner appears to rely upon specific teachings of FIG. 37, FIG. 39 and the relevant discussion of the Background section of the Shimizu reference. Such teachings are directed to generating a color output signal for the devices and as such are unrelated to color matching of apparel items. Accordingly, the cited portions of the references do not teach or suggest any motivation to combine the references in the manner asserted by the Examiner and the Section 103(a) rejection is improper.

Moreover, the Examiner fails to provide an explanation as to how the CMY values shown in FIG. 39 correspond to the claimed limitations. The CMY values of the FIG. 37 and FIG. 39 are taught to be used to convert an "L*a*b*" value into a CMY value. *See, e.g.*, col. 2, lines 35-60 and col. 37, lines 8-10. The Examiner erroneously asserts that whether the L*a*b* values are in the range involves a color matching. Instead, the Shimizu reference teaches that the ranges correspond to whether the color is reproducible by the printer. *See, e.g.*, col. 50, lines 11-18. Thus, the table fails to teach any comparison between color values as suggested by the Examiner and instead represents a conversion between L*a*b* and CMY

values. Accordingly, the Examiner has failed to provide correspondence for each claimed limitation, and the Section 103(a) rejection is improper.

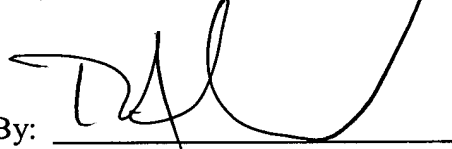
VIII. Conclusion

In view of the above, Appellant submits that the rejections of claims 17-31 are improper. Appellant therefore requests reversal of the rejections as applied to the appealed claims and allowance of the entire application.

Authority to charge the undersigned's deposit account was provided on the first page of this brief.

CRAWFORD MAUNU PLLC
1270 Northland Drive – Suite 390
St. Paul, MN 55120
(651) 686-6633

Respectfully submitted,


By: _____

Name: Robert J. Crawford
Reg. No. 32,122

CLAIMS APPENDIX
(S/N 10/403,898)

17. (Previously presented) A system for comparison of multiple apparel articles, comprising:
an on-line viewer site; and
a computer-driven web-linking engine configured and arranged to display a first colored apparel article selected by an on-line viewer from the on-line viewer site for display with a second colored apparel article selected by an on-line viewer from the on-line viewer site, the computer-driven web-linking engine adapted to use a color matching criterion to determine whether the first colored apparel article color matches the second colored apparel article color.
18. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to display an image corresponding to a structure dressed with the first colored apparel item and the second colored apparel item.
19. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to retrieve the first colored apparel item from a first store and the second colored apparel item from a second store.
20. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to retrieve the first colored apparel item and the second colored apparel item from the same store.
21. (Previously presented) The system of claim 17 wherein at least one of the first colored apparel article and the second colored apparel article are provided by a retail store and wherein the computer-driven web-linking engine is configured and arranged to be operated independent from the retail store.

22. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is configured and arranged to retrieve the first colored apparel item from a first store and the second colored apparel item from a second store and wherein the computer-driven web-linking engine is configured and arranged to be operated independent from each of the stores.

23. (Previously presented) The system of claim 17 wherein the computer-driven web-linking engine is further adapted to compare a color code provided for the first colored apparel item with another color code provided for the second colored apparel item.

24. (Previously presented) The system of claim 23 wherein the computer-driven web-linking engine is further adapted to use a color code common to each of the color codes provided for the first and second colored apparel items.

25. (Previously presented) The system of claim 23 wherein the matching criterion includes comparing the color codes and automatically indicating for the on-line viewer whether the comparison determines that the first and second colored apparel items are color compatible.

26. (Previously presented) The system of claim 24 wherein the matching criterion includes comparing the color codes and automatically indicating for the on-line viewer whether the comparison determines that the first and second colored apparel items are color compatible.

27. (Previously presented) The system of claim 23 wherein the first and second colored apparel items include respective electronic tags carrying the color codes.

28. (Previously presented) The system of claim 27 wherein the electronic tags are part of product codes that identify the respective first and second colored apparel items.

29. (Previously presented) The system of claim 23 wherein the first colored apparel item is selected from a virtual closet maintained for the on-line viewer.

30. (Previously presented) The system of claim 17 wherein the color matching criterion includes a color-reference coding chart.

31. (Previously presented) The system of claim 30 wherein the color-reference coding chart is based on measured color frequencies.

APPENDIX OF EVIDENCE

Appellant is unaware of any evidence submitted in this application pursuant to 37 C.F.R. §§ 1.130, 1.131, and 1.132.

APPENDIX OF RELATED PROCEEDINGS

As stated in Section II above, Appellant is unaware of any related appeals, interferences or judicial proceedings.